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6 IN THE UNITED STATES DISTRICT COURT  
7 FOR THE DISTRICT OF ARIZONA  
8

9 Charles Ladell Dawson )

10 Petitioner, )

11 vs. )

12 Charles L. Ryan, et al., )

13 Respondents. )  
14

No. CV-09-468-PHX-DGC (LOA)

**REPORT AND RECOMMENDATION**

15 This matter arises on Petitioner's Petition for Writ of Habeas Corpus by a Person in  
16 State Custody pursuant to 28 U.S.C. § 2254. (docket # 1) Respondents filed an Answer (docket  
17 # 15) to which Petitioner has replied. (docket # 16) Based on review of the record, the Petition  
18 should be denied for the reasons set forth below.

19 **I. Factual and Procedural Background**

20 **A. Charges, Trial and Sentencing**

21 On April 28, 2006, Petitioner was indicted in the Arizona Superior Court, Maricopa  
22 County, on one count of aggravated assault, a class 3 felony. (Respondents' Exh. A) The State  
23 subsequently filed an allegation of aggravating circumstances, other than prior convictions,  
24 alleging that: (1) the offense involved the infliction or threatened infliction of serious physical  
25 injury; and (2) the offense caused physical, emotional or financial harm to the victim.  
26 (Respondents' Exh. B) The State also filed an allegation of historical felony conviction based  
27 on Petitioner's 1988 conviction for second degree murder, and an allegation that the crime in  
28 the instant matter was a dangerous felony offense. (Respondents' Exhs. C, D)

1           On June 29, 2006, counsel for Petitioner requested a “prescreen evaluation” pursuant  
2 to Arizona Rule of Criminal Procedure 11, based on Petitioner’s history of mental illness, his  
3 status as a Value Options patient, and the fact that he had been prescribed psychiatric  
4 medication. (Respondents’ Exh. E) At an August 9, 2006 status conference, the court<sup>1</sup> noted  
5 that it had received the psychological pre-evaluation indicating that no further evaluation of  
6 Petitioner was warranted, and set the matter for trial. (Respondents’ Exh. F)

7           Thereafter, on November 20, 2006, Petitioner entered into a written plea agreement  
8 with the State, pleading guilty to aggravated assault as a class 3 felony, non-dangerous, non-  
9 repetitive offense. (Respondents’ Exhs. F, G) The plea agreement provided that “the crime  
10 carries a presumptive sentence of 3.5 years, a minimum sentence of 2.5 years (2.0 years if the  
11 trial court makes exceptional circumstances finding); and a maximum sentence of 7.0 years (8.5  
12 years if the trial court makes exceptional circumstances finding).” (Respondents’ Exh. G) The  
13 plea did not include any agreements regarding the sentence to be imposed within the applicable  
14 sentencing range. (Respondents’ Exh. G) Pursuant to the plea, Petitioner “consent[ed] to  
15 judicial factfinding by preponderance of the evidence as to any aspect or enhancement of  
16 sentence. . . .” (Respondents’ Exh. G at 2) Petitioner also waived his right “to a trial by jury  
17 to determine any fact used to impose a sentence within the range stated” in the plea agreement.  
18 (Respondents’ Exh. G at 3)

19           The court<sup>2</sup> accepted Petitioner’s plea. (docket # 8-1 at 10-28) On January 9, 2007,  
20 Petitioner was sentenced to an “exceptionally aggravated” term of 8.75 years imprisonment,  
21 with credit for 322 days of presentence incarceration. (Respondents’ Exh. H) Regarding  
22 Petitioner’s sentence, the court stated:

23           No legal cause appearing, I have considered all the circumstances presented  
24 including the mitigating circumstances alluded to by [defense counsel] and  
by the ladies who spoke this morning.

25           I have considered [Petitioner’s] mental health issue, specifically his

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27           <sup>1</sup> Commissioner Julie P. Newell presided.

28           <sup>2</sup> The Honorable James H. Keppel presided.

1 difficulty with schizophrenia.

2 I've also considered on the other side of the coin the aggravating circumstances  
3 mainly that the victim in this case was unable to defend himself due to  
prior physical impairment.

4 [Petitioner] has a prior conviction for a dangerous offense, mainly a  
5 homicide. I've considered the serious physical injuries suffered by the  
6 victim in this case as listed in the presentence report, and the emotional  
harm suffered by the victim.

7 Based on all these circumstances, I find the aggravating circumstances  
8 substantially outweigh the mitigating circumstances sufficiently to call  
for an aggravated sentence in the Department of Corrections.

9 Accordingly, it is ordered that [Petitioner] be imprisoned in the Arizona  
Department of Corrections for the super-aggravated term of 8.75 years  
to date from today's date.

10 (docket # 8-1 at 50-51, Tr. 1/9/07 at 19-20)

11 **B. Post-Conviction (Rule 32 of-right<sup>3</sup>) Proceedings**

12 On February 7, 2007, Petitioner filed a notice of post-conviction relief pursuant to  
13 Ariz.R.Crim.P. 32. (docket # 1 at 4; docket # 8-2 at 2-5) On March 26, 2007, the court  
14 appointed counsel to represent Petitioner. (Respondents' Exh. I) On June 5, 2007, counsel filed  
15 a Notice of Completion of Post-Conviction Review, advising the court that he could find no  
16 claims to raise on post-conviction review, and requesting additional time for Petitioner to file  
17 a *pro per* petition. (Respondents' Exh. J) The court granted Petitioner additional time to file  
18 his petition. (docket # 8-2 at 68)

19 On July 13, 2007, Petitioner filed a *pro per* petition raising the following claims:

- 20 1. *Apprendi* and *Blakely* apply to Petitioner's case.
- 21 2. The trial court's failure to have a jury determine the aggravating  
22 factors beyond a reasonable doubt, constituted fundamental error, and  
23 deprived Petitioner of his Fifth and Sixth Amendment rights.
- 24 3. [Petitioner's] claims are colorable because they fall within the scope  
25 of Rule 32.1, Arizona Rules of Criminal Procedure, as constitutional  
error affecting Petitioner's conviction or sentence.

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27 <sup>3</sup> Because Petitioner pled guilty, he waived his right to a direct appeal, but was entitled  
28 to bring an "of-right" post-conviction proceeding under Arizona Rule of Criminal Procedure  
32.1.

1 4. Trial counsel, change-of-plea counsel, and post-conviction counsel  
2 were ineffective for failing to raise the *Apprendi* and *Blakely* issues in  
violation of the Sixth Amendment.

3 (docket # 8-2 at 6-23) The State filed a response, to which Petitioner replied. (docket # 8-2  
4 at 24-30, 44-51) On October 29, 2007, the trial court dismissed the petition, finding that  
5 Petitioner had failed to raise a colorable claim for relief. (docket # 8-2 at 31) Petitioner filed  
6 a motion for rehearing on the ground that the trial court mistakenly found that Petitioner had not  
7 filed a reply. (docket # 8-2 at 31, 33)

8 On November 28, 2007, the trial court issued a minute entry stating that it had  
9 received and considered Petitioner's motion for rehearing regarding its October 29, 2007 minute  
10 entry. The court noted that it had incorrectly indicated that it had not received a reply from  
11 Petitioner, and stated that: "The Court has reviewed the file and notes that a Reply was received  
12 before the Court entered its minute entry. The Court has further considered [Petitioner's] Reply  
13 and finds that [Petitioner] has still failed to show a colorable claim for Post-Conviction Relief."  
14 (docket # 8-2 at 52) The court affirmed its previous ruling and dismissed the petition for post-  
15 conviction relief. (*Id.*)

16 On or about February 14, 2008, Petitioner filed a Petition for review in the Arizona  
17 Court of Appeals, raising the following claims:

18 1. The trial court erred by enhancing Petitioner's sentence from 3.5 years  
19 to a super-aggravated prison term of 8.75 years without a jury finding of  
guilty beyond a reasonable doubt in violation of Petitioner's Fifth, Sixth,  
20 Eighth, and Fourteenth Amendment rights.

21 2. Trial counsel and post-conviction counsel were ineffective in violation of  
Petitioner's Sixth Amendment rights.

22 3. The trial court erred by finding that Petitioner did not present a colorable  
23 claim for post-conviction relief.

24 (docket # 8-2 at 54-65) On December 9, 2008, the appellate court summarily denied review.  
25 (docket # 8-2 at 89)

### 26 **C. Petition for Writ of Habeas Corpus**

27 On March 6, 2009, Petitioner filed the instant Petition for Writ of Habeas Corpus  
28 pursuant to 28 U.S.C. § 2254 and a supporting Brief. (dockets # 1, # 8) The Petition contains

1 three grounds for relief, and refers to the Brief in Support of Petition for Writ of Habeas Corpus  
2 for supporting facts and argument. (docket # 8) Petitioner's supporting brief, however, is not  
3 divided into Grounds One, Two, and Three. Rather, it is a rambling discussion of Petitioner's  
4 claims which, although it includes some headings, does not precisely correspond with the  
5 Petition. The Court will separate Petitioner's claims in accordance with his Petition which  
6 identifies his claims as follows: (1) ineffective assistance of trial counsel; (2) the trial judge  
7 breached the plea agreement and abused his discretion in imposing a super-aggravated sentence;  
8 and (3) ineffective assistance of appellate counsel. (docket # 1) Respondents concede that the  
9 Petition is timely under the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), thus,  
10 the Court will not address this issue further. 28 U.S.C. § 2254(d)(1); (docket # 15 at 6-7)  
11 Respondents argue that several of Petitioner's claims raised in Ground One<sup>4</sup> are procedurally  
12 defaulted and barred from habeas corpus review. Respondents concede that Petitioner's  
13 remaining claims are properly exhausted state remedies, but argue that those claims lack merit.  
14 Petitioner disputes these assertions.

## 15 **II. Exhaustion and Procedural Default**

16 Pursuant to 28 U.S.C. § 2254(b)(1), before a federal court may consider a state  
17 prisoner's application for a writ of habeas corpus, the prisoner must have exhausted available  
18 state-court remedies. *Coleman v. Thompson*, 501 U.S. 722, 731 (1991). To properly exhaust  
19 state remedies, the prisoner must have afforded the state courts the opportunity to rule upon the  
20 merits of his federal constitutional claims by "fairly presenting" them to the state courts in a  
21 procedurally appropriate manner. *Castille v. Peoples*, 489 U.S. 346, 349 (1989); *Baldwin v.*  
22 *Reese*, 541 U.S. 27, 29 (2004) (stating that "[t]o provide the State with the necessary  
23 'opportunity,' the prisoner must 'fairly present' her claim in each appropriate state court . . .  
24 thereby alerting the court to the federal nature of the claim.").

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26 <sup>4</sup> Although Respondents state that Petitioner's claims raised in Ground One are  
27 procedurally defaulted, it is clear that Respondents also refer to several claims which Petitioner  
28 grouped both with Grounds One and Two. (docket # 1, # 8, # 15) The manner in which  
Petitioner presented his claims resulted in the confusion.

1 Contrary to Respondents’ assertion, in Arizona, unless a prisoner has been sentenced  
2 to death, the “highest court” requirement is satisfied if the petitioner has presented his federal  
3 claim to the Arizona Court of Appeals either on direct appeal or in a petition for post-conviction  
4 relief. *See Crowell v. Knowles*, 483 F.Supp.2d 925 (D.Ariz. 2007) (discussing *Swoopes v.*  
5 *Sublett*, 196 F.3d 1008, 1010 (9<sup>th</sup> Cir. 1999)); *Swoopes*, 196 F.3d at 1010 (stating that “Arizona  
6 has declared that its complete round [of appellate review] does not include discretionary review  
7 before the Arizona Supreme Court.”)

8 To fairly present a claim, a habeas petitioner must cite in state court to the specific  
9 constitutional guarantee upon which he bases his claim in federal court. *Tamalini v. Stewart*,  
10 249 F.3d 895, 898 (9th Cir. 2001). General appeals to broad constitutional principles, such as  
11 due process, equal protection, and the right to a fair trial, do not establish fair presentation of  
12 a federal constitutional claim. *Lyons v. Crawford*, 232 F.3d 666, 669 (9th Cir. 2000), *amended*  
13 *on other grounds*, 247 F.3d 904 (9th Cir. 2001); *Shumway v. Payne*, 223 F.3d 982, 987 (9th Cir.  
14 2000) (insufficient for prisoner to have made “a general appeal to a constitutional guarantee,”  
15 such as a naked reference to “due process,” or to a “constitutional error” or a “fair trial”).  
16 Similarly, a mere reference to the “Constitution of the United States” does not preserve a claim.  
17 *Gray v. Netherland*, 518 U.S. 152, 162-63 (1996). Even if the basis of a federal claim is “self-  
18 evident” or if the claim would be decided “on the same considerations” under state or federal  
19 law, the petitioner must make the federal nature of the claim “explicit either by citing federal  
20 law or the decision of the federal courts . . . .” *Lyons*, 232 F.3d at 668. A state prisoner does  
21 not fairly present a claim to the state court if the court must read beyond the petition or brief  
22 filed in that court to discover the federal claim. *Baldwin*, 541 U.S. at 27. In summary, a  
23 “petitioner fairly and fully presents a claim to the state court for purposes of satisfying the  
24 exhaustion requirement if he presents the claim: (1) to the proper forum; (2) through the proper  
25 vehicle, and (3) by providing the proper factual and legal basis for the claim.” *Insyxiengmay*  
26 *v. Morgan*, 403 F.3d 657, 668 (9<sup>th</sup> Cir. 2005) (citations omitted).

1           Where a prisoner fails to “fairly present” a claim to the State courts in a procedurally  
2 appropriate manner, state court remedies may, nonetheless, be “exhausted.” This type of  
3 exhaustion is often referred to as “procedural default” or “procedural bar.” *Ylst v. Nunnemaker*,  
4 501 U.S. 797, 802-05 (1991); *Coleman*, 501 U.S. at 731-32. There are two categories of  
5 procedural default. First, a state court may have applied a procedural bar when the prisoner  
6 attempted to raise the claim in state court. *Nunnemaker*, 501 U.S. at 802-05. Second, the state  
7 prisoner may not have presented the claim to the state courts, but pursuant to the state courts’  
8 procedural rules, a return to state court would be “futile.” *Teague v. Lane*, 489 U.S. 288, 297-99  
9 (1989). Generally, any claim not previously presented to the Arizona courts is procedurally  
10 barred from federal review because any attempt to return to state court to properly exhaust a  
11 current habeas claim would be “futile.” Ariz. R. Crim. P. 32.1, 32.2(a) & (b); *Beaty v. Stewart*,  
12 303 F.3d 975, 987 (9th Cir. 2002); *State v. Mata*, 185 Ariz. 319, 322-27, 916 P.2d 1035, 1048-  
13 53 (1996); Ariz. R. Crim. P. 32.1(a)(3) (relief is precluded for claims waived at trial, on appeal,  
14 or in any previous collateral proceeding); 32.4(a); Ariz. R. Crim. P. 32.9 (stating that petition  
15 for review must be filed within thirty days of trial court’s decision). A state post-conviction  
16 action is futile where it is time-barred. *Beaty*, 303 F.3d at 987; *Moreno v. Gonzalez*, 116 F.3d  
17 409, 410 (9th Cir. 1997) (recognizing untimeliness under Ariz. R. Crim. P. 32.4(a) as a basis  
18 for dismissal of an Arizona petition for post-conviction relief, distinct from preclusion under  
19 Rule 32.2(a)).

20           In either case of procedural default, federal review of the claim is barred absent a  
21 showing of “cause and prejudice” or a “fundamental miscarriage of justice.” *Dretke v. Haley*,  
22 541 U.S. 386, 393-94 (2004); *Murray v. Carrier*, 477 U.S. 478, 488 (1986). To establish cause,  
23 a petitioner must establish that some objective factor external to the defense impeded his efforts  
24 to comply with the state’s procedural rules. *Id.* The following objective factors may constitute  
25 cause: (1) interference by state officials, (2) a showing that the factual or legal basis for a claim  
26 was not reasonably available, or (3) constitutionally ineffective assistance of counsel. *Id.* To  
27 establish prejudice, a prisoner must demonstrate that the alleged constitutional violation  
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1 “worked to his actual and substantial disadvantage, infecting his entire trial with error of  
2 constitutional dimension.” *United States v. Frady*, 456 U.S. 152, 170 (1982). Where petitioner  
3 fails to establish cause, the court need not reach the prejudice prong.

4 To establish a “fundamental miscarriage of justice” resulting in the conviction of one  
5 who is actually innocent, a state prisoner must establish that it is more likely than not that no  
6 reasonable juror would have found him guilty beyond a reasonable doubt in light of new  
7 evidence. *Schlup v. Delo*, 513 U.S. 298, 327 (1995); 28 U.S.C. § 2254(c)(2)(B).

## 8 **A. Application of Law to Petitioner’s Claims**

### 9 **1. Ground One**

10 In Ground One, Petitioner contends that trial counsel was ineffective for failing to  
11 develop a record concerning Petitioner’s mental health issues as related to Rule 11 hearing, and  
12 for failing to develop a record concerning Petitioner’s *Apprendi/Blakely/Cunningham* by failing  
13 to object to Petitioner’s sentence on *Blakely/Apprendi* grounds. (docket # 1 at 6, docket # 8 at  
14 16- 21)  
15

16 Respondents assert that Petitioner’s claims asserted in Ground One are procedurally  
17 defaulted because he failed to raise these claims to the State courts. (docket # 15) The record  
18 reflects that Petitioner never presented to the state courts his claim that trial counsel was  
19 ineffective for failing to develop a record concerning Petitioner’s mental health. Accordingly,  
20 Petitioner’s claim that trial counsel was ineffective on that basis is unexhausted and  
21 procedurally defaulted. However, on post-conviction review, Petitioner did challenge trial  
22 counsel’s failure to object to his sentence on *Apprendi/Blakely* grounds. Accordingly, the court  
23 will consider the merits of that claim in Section III below.

### 24 **2. Ground Two**

25 Ground Two contains several claims. Petitioner first alleges that the trial court  
26 violated Petitioner’s Sixth Amendment rights by imposing an aggravated sentence based on  
27 facts that were not found beyond a reasonable doubt by a jury. (docket # 1 at 7) As  
28



1 Respondents concede, Petitioner exhausted this claim on post-conviction review, and it is  
2 properly before this Court on habeas corpus view. The Court will consider the merits of  
3 Petitioner's challenge to his sentence in Section III, *infra*.

4 In Ground Two, Petitioner further claims the State and trial counsel breached the  
5 plea agreement by "tricking" him into entering the plea "on false pretenses." (docket # 1 at 7,  
6 docket # 8 at 23-29) In support of this assertion, Petitioner contends that: (1) the State used  
7 Petitioner's prior conviction, dangerous offense, and elements of a dismissed case against him  
8 at sentencing in violation of the plea agreement; (2) neither defense counsel nor the trial court  
9 adequately developed the mitigating factors related to Petitioner's mental health; (3) the court  
10 failed to hold a competency hearing to address Petitioner's mental health; and (4) trial counsel  
11 failed to arrange a psychiatric evaluation or to utilize available psychiatric information to urge  
12 the court to hold a competency hearing. (docket # 8 at 25-27)

13 Respondents assert that the foregoing claims are procedurally barred because  
14 Petitioner did not raise those allegations to the State courts. (docket # 15) The Court agrees.  
15 The record reflects that Petitioner did not raise those foregoing claims to the state courts and  
16 that they are procedurally defaulted as discussed in Section II, B, *infra*.

### 17 **3. Ground Three**

18 In Ground Three, Petitioner argues that counsel for his Rule 32 of-right proceeding,  
19 who Petitioner refers to as appellate counsel, was ineffective for failing to challenge his  
20 aggravated sentence on Sixth Amendment grounds. (docket # 1 at 8) As Respondents concede,  
21 this claim is properly before this Court on habeas corpus review. (docket # 15; docket # 8-2 at  
22 54)

### 23 **B. Procedural Bar**

24 As set forth above, Petitioner did not exhaust the following claims: (1) trial counsel  
25 was ineffective for failing to develop a record concerning Petitioner's mental health issues as  
26 related to Rule 11 hearing; (2) the State and trial counsel breached the plea agreement by  
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1 “tricking” him into entering the plea “on false pretenses”; (3) the State used Petitioner’s prior  
2 conviction, dangerous offense, and elements of a dismissed case against him at sentencing in  
3 violation of the plea agreement; (4) neither defense counsel nor the trial court adequately  
4 developed the mitigating factors related to Petitioner’s mental health; (5) the court failed to hold  
5 a competency hearing to address Petitioner’s mental health; and (6) trial counsel failed to  
6 arrange a psychiatric evaluation or to utilize available psychiatric information to urge the court  
7 to hold a competency hearing.

8           Because Petitioner failed to present the foregoing claims to the state courts, those  
9 claims are technically exhausted and procedurally defaulted because he cannot now return to  
10 state court to present those claims. The “deadlines” for seeking post-conviction review in the  
11 state court have “long passed.” *White v. Lewis*, 874 F.2d 599, 602 (9<sup>th</sup> Cir. 1989) (affirming the  
12 district court's dismissal of a habeas corpus petition because petition lacked a “currently  
13 available state remedy at the time of the federal petition.”); Ariz.R.Crim.P. 32.4 (providing that  
14 a notice of post-conviction relief “must be filed within ninety days after the entry of judgment  
15 and sentence or within thirty days after the issuance of the order and mandate in the direct  
16 appeal, whichever is the later.”). Additionally, Petitioner is precluded from raising those claims  
17 in a second or successive Rule 32 petition because he could have raised them in his previous  
18 Rule 32 petition. Ariz.R.Crim.P. 32.2(a)(3) (establishing that a defendant “shall be precluded  
19 from relief under this rule based on any ground” that has been waived “in any previous  
20 collateral proceeding.”).

21           Because Petitioner’s claims that: trial counsel was ineffective for failing to develop  
22 a record concerning Petitioner’s mental health issues as related to Rule 11 hearing; the State and  
23 trial counsel breached the plea agreement by “tricking” into entering the plea “on false  
24 pretenses; the State used Petitioner’s prior conviction, dangerous offense, and elements of a  
25 dismissed case against him at sentencing in violation of the plea agreement; neither defense  
26 counsel nor the trial court adequately developed the mitigating factors related to Petitioner’s  
27 mental health; the court failed to hold a competency hearing to address Petitioner’s mental  
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1 health; and trial counsel failed to arrange a psychiatric evaluation or to utilize available  
2 psychiatric information to urge the court to hold a competency hearing, are procedurally  
3 defaulted, federal review is barred absent a showing of “cause and prejudice” or a “fundamental  
4 miscarriage of justice.” *House v. Bell*, 547 U.S. 518, 535-36 (2006); *Bradshaw v. Richey*, 546  
5 U.S. 74 (2005); *Moorman v. Schriro*, 426 F.3d 1044, 1058 (9<sup>th</sup> Cir. 2005) (stating that “[a]  
6 prisoner who fails to comply with state procedures cannot receive federal habeas corpus review  
7 of a defaulted claim unless the petitioner can demonstrate either cause for the default and  
8 resulting prejudice, or that failure to review the claims would result in a fundamental  
9 miscarriage of justice.”). To establish cause, a petitioner must show that some objective  
10 external factor impeded his efforts to comply with the state’s procedural rules. *Id.* The  
11 following objective factors may constitute cause: (1) interference by state officials, (2) a  
12 showing that the factual or legal basis for a claim was not reasonably available, or (3)  
13 constitutionally ineffective assistance of counsel. *Robinson v. Ignacio*, 360 F.3d 1044, 1052 (9<sup>th</sup>  
14 Cir. 2004). To establish prejudice, a petitioner must demonstrate that the alleged constitutional  
15 violation “worked to his actual and substantial disadvantage, infecting his entire trial with error  
16 of constitutional dimension.” *United States v. Frady*, 456 U.S. 152, 170 (1982).

17           Petitioner has not established cause for his procedural default. (see dockets # 1, 8, 16)  
18 Petitioner’s status as an inmate and lack of legal knowledge do not constitute cause for his  
19 failure to present his second ground for relief to the Arizona courts. *Hughes v. Idaho State*  
20 *Board of Corrections*, 800 F.2d 905, 909 (9<sup>th</sup> Cir. 1986) (finding that an illiterate *pro se*  
21 petitioner’s lack of legal assistance did not amount to cause to excuse a procedural default);  
22 *Tacho v. Martinez*, 862 F.2d 1376, 1381 (9<sup>th</sup> Cir. 1988) (finding that petitioner’s arguments  
23 concerning his mental health and reliance upon jailhouse lawyers did not constitute cause.).

24           Likewise, Petitioner has not satisfied the “fundamental miscarriage of justice”  
25 standard because he has not shown that it is more likely than not that no reasonable juror would  
26 have found him guilty beyond a reasonable doubt in light of new evidence. *Schlup v. Delo*, 513  
27 U.S. 298, 327 (1995); 28 U.S.C. § 2254(c)(2)(B); *Calderon v. Thompson*, 523 U.S. 538, 559  
28

(1998) (“[T]he miscarriage of justice exception is concerned with actual as compared to legal innocence. . . . Given the rarity of [reliable] evidence [of actual innocence], in virtually every case, the allegation of actual innocence has been summarily rejected.”) (internal quotation marks and citations omitted); *Dretke v. Haley*, 541 U.S. 386, 393 (2004) (reaffirming that the “fundamental miscarriage of justice” standard is a “narrow exception” that only applies where “a constitutional violation has ‘probably resulted’ in the conviction of one who is ‘actually innocent’ of the substantive offense.”) (quoting *Murray v. Carrier*, 477 U.S. 478, 496 (1986)).

Because Petitioner’s claims discussed above are procedurally defaulted and he fails to establish a basis to excuse his default, federal habeas corpus review of those claims is barred. *Dretke v. Haley*, 541 U.S. at 393-94.

### **III. Analysis**

#### **A. Standard of Review**

This Court’s analysis of the merits of Petitioner’s claims is constrained by the applicable standard of review. A state prisoner “whose claim was adjudicated on the merits in state court is not entitled to relief in federal court unless he meets the requirements of 28 U.S.C. § 2254(d).” *Price v. Vincent*, 538 U.S. 634, 638 (2003). Specifically, the AEDPA’s “high burden” requires a federal habeas petitioner to prove that the state-court decision “was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States,” or “resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.” 28 U.S.C. § 2254(d)(1)-(2); *Uttecht v. Brown*, 551 U.S. 1 (2007); *Carey v. Musladin*, 549 U.S. 70, 74 (2006) (stating that “federal habeas relief may be granted” only if the state court’s decision “was contrary to or involved an unreasonable application of this Court’s applicable holdings.”).

Under the “contrary to” clause of § 2254(d), a federal habeas court may not issue a writ, unless the state court: (1) applied a rule of law “that contradicts the governing law set forth in [Supreme Court] cases,” or (2) “confronts a set of facts that are materially

1 indistinguishable from a decision of [the Supreme Court] and nevertheless arrives at a result  
2 different from [Supreme Court] precedent.” *Williams v. Taylor*, 529 U.S. 362, 411 (2000). In  
3 other words, a petitioner may be entitled to habeas corpus relief if he establishes that Supreme  
4 Court precedent requires a contrary outcome because the state court applied the wrong legal  
5 rules. *Williams*, 529 U.S. at 405; *Benn v. Lambert*, 283 F.3d 1040, 1052 n. 6 (9<sup>th</sup> Cir. 2002).

6 A state court decision is reviewed under the “unreasonable application of” standard  
7 where the state court identifies the correct legal rule, but unreasonably applies that rule to the  
8 facts of a particular case. *Williams*, 529 U.S. at 405; *Rompilla v. Beard*, 545 U.S. 374, 380  
9 (2005). Under this standard, “[i]t is not enough that a federal habeas court, in its independent  
10 review of the legal question,” is left with the “firm conviction” that the state court ruling was  
11 “erroneous.” *Id.*; *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003). Rather, the state court decision  
12 “must be objectively unreasonable.” *Middleton v. McNeil*, 541 U.S. 433 (2004); *Andrade*, 538  
13 U.S. at 76; *Rompilla*, 545 U.S. at 380. An *unreasonable* application is different from an  
14 incorrect application of law. *Bell v. Cone*, 535 U.S. 685, 694 (2002). The Court will consider  
15 Petitioner’s claims in view of this standard.

## 16 **B. Merit of Petitioner’s Claims**

17 In his claims that are properly before the Court, Petitioner argues that the trial court  
18 abused its discretion in imposing a super-aggravated sentence, and that trial counsel and post-  
19 conviction counsel were ineffective for failing to challenge his sentence on *Apprendi/Blakely*  
20 grounds. (docket # 1 at 6-8; docket # 8 at 20, 23-29, 37-44) Because the relevant facts and  
21 procedural history of these claims are intertwined, the Court will address them together.  
22

23 Petitioner raised these same claims on post-conviction review, arguing that:

24 In this case, Mr. Randall J. Craig, trial counsel, change of plea counsel,  
25 and sentencing counsel[;] Mr. Thomas J. Dennis, post-conviction [relief]  
26 counsel; and Mr. Michael J. Dew, post-conviction [relief] counsel, [a]ll  
27 were ineffective for failure to raise the *Apprendi* and *Blakely*, *supra*,  
28 issues.

1 Under the plea agreement the defendant can only be sentence[d] to the  
2 term for the offense under a class 3 felony, which is 3.5 years. *See*  
3 A.R.S. § 13-701(C)(2) (2007).

4 The aggravating factor must be dismiss[ed] with prejudice because no  
5 jury determination was made beyond a reasonable doubt. *See Apprendi*,  
6 and *Blakely, supra*; *see also State v. Johnson*, 183 Ariz. 358 (Ariz. App.  
Div. 1 1995).

7 Under the plea agreement the defendant was also eligible for probation.  
8 Thus, the defendant could only be sentence[d] to 3.5 years or probation.

9 All of the defendant's counsel[] were ineffective for failure to raise  
10 *Apprendi, Blakely*, and *Johnson, supra*, issues . . . and the outcome would  
11 have been different. *Strickland v. Washington*, 466 U.S. 668. (1984).

12 (docket # 8-2 at 16-17) Petitioner clarified that he was “not rejecting the plea agreement,” but  
13 that error occurred when the trial court found aggravating factors that enhanced Petitioner's  
14 sentence. The post-conviction court rejected Petitioner's claims, finding that Petitioner had not  
15 raised a colorable claim for relief. (docket # 8-2 at 31, 52) The Arizona Court of Appeals  
16 summarily affirmed. (docket # 8-2 at 89) Petitioner has not shown that the state court's  
17 decision was contrary to, or involved an unreasonable application of, federal law, or was based  
18 on an unreasonable determination of the facts. 28 U.S.C. § 2254(d).

19 The thrust of Petitioner's claims is that his aggravated sentence violates his Sixth  
20 Amendment rights articulated in *Apprendi/Blakely* because the trial court, rather than a jury,  
21 found the aggravating factors by a preponderance of the evidence. As an initial matter, the  
22 Court will consider the effect of Petitioner's plea agreement on this issue.

23 The terms of the plea agreement are controlled by the principles of contract law. *See*,  
24 *e.g., United States v. Sandoval-Lopez*, 122 F.3d 797, 800 (9th Cir.1997) (“Plea bargains are  
25 contractual in nature and subject to contract-law standards.”); *United States v. Keller*, 902 F.2d  
26 1391, 1393 (9<sup>th</sup> Cir. 1990). Thus, courts apply contract principles to examine and enforce the  
27 plain language of the contract, or plea agreement, and do not consider extrinsic evidence to  
28

1 interpret the terms plea agreement if it is clear and unambiguous on its face. *United States v.*  
2 *Nunez*, 223 F.3d 956, 958 (9<sup>th</sup> Cir. 2000) (citing *Wilson Arlington Co. v. Prudential Ins. Co. of*  
3 *America*, 912 F.2d 366, 370 (9<sup>th</sup> Cir. 1990)); *United States v. Trapp*, 257 F.3d 1053, 1056 (9<sup>th</sup>  
4 Cir. 2001). The Ninth Circuit regularly enforces “knowing and voluntary” waivers of appellate  
5 rights in criminal cases, provided that the waivers are part of negotiated guilty pleas, *see United*  
6 *States v. Michlin*, 34 F.3d 896, 898 (9th Cir.1994), and do not violate public policy, *see United*  
7 *States v. Baramdyka*, 95 F.3d 840, 843 (9th Cir.1996) (cataloguing public policy exceptions).  
8 Likewise, the Supreme Court has held that a defendant’s right to a jury trial on aggravating  
9 factors may be waived. *Blakely v. Washington*, 542 U.S. 296, 310 (2004).

10           In this case, before entering a plea agreement, Petitioner participated in a settlement  
11 conference, during which he was advised of the consequences of going to trial and being  
12 convicted, the range of sentence if he pled guilty, and the range of the sentence if convicted of  
13 the charges with, or without, a prior felony conviction. (docket # 8-1 at 13-18) During the  
14 conference, Petitioner inquired about the charges and proceedings, and the court answered those  
15 questions. (*Id.* at 16-17) Following further plea negotiations, Petitioner entered into a plea  
16 agreement pursuant to which he plead guilty to aggravated assault as a class 3 felony, non-  
17 dangerous, non-repetitive offense. (Respondents’ Exh. G) During the change of plea hearing,  
18 Petitioner was specifically advised that, under his plea, he could be sentenced to prison, and “the  
19 range would be anywhere from 2 to 8.75 years.” (docket # 8-1 at 21) The plea agreement  
20 specifically provided that Petitioner waived his right to jury determination of aggravating  
21 factors and consented to judicial fact-finding by a preponderance of the evidence as to any  
22 aspect or enhancement of his sentence. (Respondents’ Exh. G) Paragraph one of the plea  
23 agreement stated that the crime of aggravated assault, a class 3 felony, “carries a presumptive  
24 sentence of 3.5 years; a minimum sentence of 2.5 years (2.0 years if the trial court makes  
25 exceptional circumstances finding); and a maximum sentence of 7 years (8.75 years if the trial  
26 court makes exceptional circumstances finding).” (Respondents’ Exh. G) Paragraph 2 of the  
27 plea agreement further provided that, there were “no agreements as to sentencing.” *Id.*  
28

1 Pursuant to the plea agreement, Petitioner specifically waived his right to “a trial by jury to  
2 determine guilt and to determine any facts used to impose sentence with the range stated above  
3 in paragraph one.” (Respondents’ Exh. G at 2-3) Petitioner also waived “any and all motions,  
4 defenses, objections, or requests which he has made or raised, or could assert hereafter, to the  
5 court’s entry of judgment against him *and imposition of a sentence* upon him consistent with  
6 this agreement.” (Respondents’ Exh. G at 2) (emphasis added)

7           The Court sentenced Petitioner to 8.75 years’ imprisonment which comported with  
8 the terms of the plea agreement. Because Petitioner was sentenced in accordance with the plea  
9 agreement, his guilty plea effectively waived his right challenge to his sentence. *See United*  
10 *States v. Shedrick*, 493 F.3d 292, 303 (3<sup>rd</sup> Cir. 2007) (concluding that defendant’s “*Blakely*-  
11 based contention,” was argument that defendant “waived as part of [his] plea agreement.”);  
12 *United States v. Cortez-Arias*, 403 F.3d 1111 (9<sup>th</sup> Cir. 2005), *amended by* 425 F.3d 547, 548 n.  
13 8 (2005) (joining other circuits in concluding that a claim under [*United States v.*] *Booker*, 543  
14 U.S. 220 (2005) was waived when defendant waived the right to appeal his sentence, noting that  
15 in exchange for his guilty plea and waiver, the defendant received a benefit).

16           Moreover, even if Petitioner had not waived his right to challenge his sentence, his  
17 challenge to his aggravated sentence lacks merit. Petitioner argues that his aggravated sentence  
18 violates the Sixth Amendment because factors used to impose an aggravated sentence were not  
19 found by a jury beyond a reasonable doubt. Supreme Court case law instructs that the Sixth  
20 Amendment’s jury-trial guarantee proscribes the imposition of a sentence above the statutory  
21 maximum based on a fact, other than a prior conviction, not found by a jury or admitted by the  
22 defendant. *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Blakely v. Washington*, 542 U.S. 296  
23 (2004); *United States v. Booker*, 543 U.S. 220 (2005). Since it first articulated this rule, the  
24 Supreme Court has retained an exception for prior convictions. *Id.*; *United States v. Quintana-*  
25 *Quintana*, 383 F.3d 1052, 1053 (9<sup>th</sup> Cir. 2004); *United States v. Maria-Gonzalez*, 268 F.3d 664,  
26 670 (9<sup>th</sup> Cir. 2001) (holding that prior aggravated felony conviction did not constitute an  
27  
28



1 element of the offense where base sentence for illegally reentering the United States following  
2 deportation is enhanced if deportation was subsequent to conviction for aggravated felony).

3 In *Blakely*, the Court applied the rule announced in *Apprendi* and clarified that the  
4 “‘statutory maximum’ for *Apprendi* purposes is the maximum sentence a judge may impose  
5 *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*. . . . In  
6 other words, the relevant ‘statutory maximum’ is not the maximum sentence a judge may  
7 impose after finding additional facts, but the maximum he may impose *without* any additional  
8 findings.” *Blakely*, 542 U.S. at 303-04 (emphasis in original). The Court concluded that before  
9 a trial court can impose a sentence above the statutory maximum, a jury must find beyond a  
10 reasonable doubt, or defendant must admit, all facts “*legally essential* to the punishment.”  
11 *Blakely*, 542 U.S. at 313 (emphasis added).

12 In *State v. Martinez II*, 210 Ariz. 578, 583, 115 P.3d 618, 623 (Ariz. 2005), the  
13 Arizona Supreme Court considered the impact of *Blakely* on Arizona’s sentencing scheme. In  
14 Arizona, the statutory maximum sentence in a case where no *Blakely*-compliant or  
15 *Blakely*-exempt aggravating factors are present is the presumptive term. *Martinez*, 210 Ariz. at  
16 583, 115 P.3d at 623; *State v. Price*, 217 Ariz. 182, 184-85, 171 P.3d 1223, 1225-26 (2007).  
17 However, because an Arizona defendant may receive an aggravated sentence based on one  
18 aggravating factor, A.R.S. § 13-702(B), a single *Blakely*-compliant or *Blakely*-exempt  
19 aggravating factor establishes the facts “legally essential” to punishment. Once such a factor  
20 is established, the trial court is free to consider additional facts to determine where to sentence  
21 a defendant within the aggravated range. *Martinez*, 210 Ariz. at 584-585, 115 P.3d at 625;  
22 *Price*, 217 Ariz. 182, 185, 171 P.3d at 1226 (stating that “[i]f there is one *Apprendi*-compliant  
23 aggravating factor, ‘a defendant is exposed to a sentencing range that extends to the maximum  
24 punishment available under section 13-702.’”) (citation omitted).

25 In *Stokes v. Schriro*, 465 F.3d 397, 402-03 (9<sup>th</sup> Cir. 2006), the Ninth Circuit held that  
26 “the Arizona state courts’ interpretation of these [sentencing] provisions does not contradict  
27 clearly established federal law [*Apprendi/Blakely*]. A statutory maximum need not be defined  
28

1 by every one of the facts found at trial, so long as the defendant is not exposed to a greater  
2 punishment than that authorized solely by those facts (or the fact of a prior conviction). . . .” *Id.*  
3 at 402-03 (internal quotations and citations omitted).

4 Consistent with *Stokes*, several district courts within the Ninth Circuit have  
5 concluded that “once a jury finds or a defendant admits a single aggravating factor, the Sixth  
6 Amendment permits the sentencing judge to find and consider additional factors relevant to the  
7 imposition of a sentence up to the maximum prescribed in that statute.” *Jones v. Schriro*, No.  
8 CV-05-3720-PHX-JAT (DKD), 2006 WL 1794765, \* 2-3 (D.Ariz., June 27, 2006) (quoting  
9 *State v. Martinez*, 210 Ariz. 578, 585, 115 P.2d 618 (2005)). In *Jones*, the court found that the  
10 rule of *Blakely* was satisfied once petitioner admitted a single aggravating factor. *Id.* at \* 3.  
11 Specifically, petitioner in *Jones* admitted - in the written plea agreement, at the change of plea  
12 hearing, or at sentencing - to three different aggravating factors. *Id.* The *Jones* court found that  
13 petitioner’s admission of any one of those aggravating factors authorized the trial court to  
14 impose a sentence anywhere within the statutory range. *Id.*

15 In *Garcia v. Schriro*, No. 06-855-PHX-DGC (DKD), 2006 WL 3292473 (D.Ariz.,  
16 Nov. 9, 2006), the district court held that petitioner’s aggravated sentence did not violate  
17 *Blakely*. The court found that the “trial court properly considered petitioner’s prior convictions  
18 as an aggravating circumstance that increased the maximum allowable sentence under *Blakely*.  
19 Once the new maximum was established, the court was free to consider the other aggravating  
20 circumstances of parole violation and pecuniary gain in deciding where to sentence petitioner  
21 within the new maximum range.” *Id.* at \* 2. In so finding, the court explained that Petitioner’s  
22 admission of pecuniary gain in the plea agreement was sufficient to establish an aggravating  
23 factor in accordance with *Blakely*. *Id.* at \* 3. See also *Nino v. Flannigan*, No. 2:04cv2298-  
24 JWS (CRP), 2007 WL 1412493, \* 4 (D.Ariz., May 14, 2007) (finding that because “one *Blakely*  
25 exempt factor supports the aggravated sentence, consideration of other factors when imposing  
26 a sentence does not violate Petitioner’s Fifth and Sixth Amendment rights established in  
27 *Blakely*.”).

1 Similarly, in this case, Petitioner pled guilty to aggravated assault, a class 3 felony.  
2 (Respondents' Exh. G) Petitioner admitted one prior felony conviction. (Respondents' Exh.  
3 G) As part of the factual basis of the plea, Petitioner also admitted that: he "caused serious  
4 physical injury to the victim;" that he knocked the victim unconscious during a fight; and while  
5 the victim was unconscious, Petitioner "struck him repeatedly in the face causing some facial  
6 fractures." (docket # 8-2 at 25-25, Tr. 11/20/06 at 16-17) Under the applicable Arizona law,  
7 at the time of Petitioner's sentencing a conviction for aggravated assault, a class 3 felony,  
8 yielded a presumptive term of 3.5 years' imprisonment. (Respondents' Exh. G; docket # 8-1  
9 at 14) The court could impose a term as low as 2 years, or an aggravated term as high as 8.75  
10 years. (Respondents' Exh G; docket # 8-2 at 14) The court sentenced Petitioner to an  
11 aggravated term of 8.75 years' imprisonment. The court found the following aggravating  
12 factors: (1) the victim's inability to defend himself due to prior physical impairment; (2)  
13 Petitioner's prior conviction for a dangerous offense, homicide; (3) series physical injuries  
14 suffered by the victim; and (4) emotional harm suffered by the victim. (docket # 8-1 at 50-51;  
15 Tr. 1/9/2007 at 19-20) The court's consideration of these factors in sentencing Petitioner did  
16 not violate his Sixth Amendment rights.

17 Petitioner's prior conviction is exempt from *Blakely's* jury trial requirement and  
18 allowed the trial court to impose an aggravated sentence. *Blakely*, 542 U.S. at 301-02.  
19 Although the trial court also found several other aggravating factors, Petitioner's prior felony  
20 conviction, and/or the aggravating factors which he admitted - causing serious physical injury,  
21 and repeatedly striking the victim after he was unconscious- were sufficient to expose him to  
22 the aggravated term of imprisonment. *Blakely*, 542 U.S. at 303-04.

23 Based on the foregoing, the state court's finding that Petitioner's aggravated  
24 sentence did not violate the Sixth Amendment is neither contrary to, nor an unreasonable  
25 application of, the Supreme Court's *Apprendi/Blakely* jurisprudence. 28 U.S.C. §2254(d).  
26 Accordingly, Petitioner's claim that the trial court violated the Sixth Amendment by imposing  
27 an aggravated sentence fails.  
28

### C. Ineffective Assistance of Counsel

Petitioner further argues that trial and post-conviction counsel were ineffective for failing to challenge his aggravated sentenced on *Apprendi/Blakely* grounds.<sup>5</sup> (docket # 1 at 6, 8) The controlling Supreme Court precedent on claims of ineffective assistance of counsel is *Strickland v. Washington*, 466 U.S. 668 (1984). Under *Strickland*, a petitioner must show that counsel's performance was objectively deficient and that counsel's deficient performance prejudiced the petitioner. *Strickland*, 466 U.S. at 687; *Hart v. Gomez*, 174 F.3d 1067, 1069 (9<sup>th</sup> Cir. 1999). To be deficient, counsel's performance must fall "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. When reviewing counsel's performance, the court engages a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment. *Strickland*, 466 U.S. at 690. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689. Review of counsel's performance is "extremely limited." *Coleman v. Calderon*, 150 F.3d 1105, 1113 (9<sup>th</sup> Cir. 1998), *rev'd on other grounds*, 525 U.S. 141 (1998). Acts or omissions that "might be considered sound trial strategy" do not constitute ineffective assistance of counsel. *Strickland*, 466 U.S. at 689.

To establish a Sixth Amendment violation, petitioner must also establish that he suffered prejudice as a result of counsel's deficient performance. *Strickland*, 466 U.S. at 691-

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<sup>5</sup> In his supporting brief, Petitioner also asserts that his Rule 32 of-right counsel was ineffective for failing to raise Rule 11 concerns. (docket # 8 at 39, 40) Petitioner, however, provides no support for his argument. Rather, his claim consists of a single sentence, which he repeats several times: "Petitioner submits he was prejudiced by appellate counsel's failure to brief these claims, as of right (with Rule 11 concerns) in his Rule 32 petition." (docket # 8 at 40) Petitioner's unsupported, conclusory allegations are not sufficient to support a claim for federal habeas relief. *Jones v. Gomez*, 66 F.3d 199, 204-05 (9<sup>th</sup> Cir. 1995) (stating that conclusory allegations with no reference to the record or other evidence do not warrant habeas relief.).

92; *United States v. Gonzalez-Lopez*, 548 U.S. 140, 147 (2006) (stating that “a violation of the Sixth Amendment right to effective representation is not ‘complete’ until the defendant is prejudiced.”) To show prejudice, petitioner must demonstrate a “reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694; *Hart*, 174 F.3d at 1069; *Ortiz v. Stewart*, 149 F.3d 923, 934 (9th Cir. 1998). The court may proceed directly to the prejudice prong. *Jackson v. Calderon*, 211 F.3d 1148, 1155 n. 3 (9<sup>th</sup> Cir. 2000) (citing *Strickland*, 466 U.S. at 697). The court, however, may not assume prejudice solely from counsel’s allegedly deficient performance. *Jackson*, 211 F.3d at 1155.

As previously discussed, pursuant to his plea agreement, Petitioner consented to judicial fact finding by a preponderance of the evidence at sentencing. (Respondents’ Exh. G at 1, 2) Additionally, Petitioner admitted his prior felony conviction, a *Blakely*-exempt aggravating factor - which exposed Petitioner to the fully aggravated sentencing range and permitted the court to consider other factors in imposing Petitioner’s sentence. During the change-of-plea hearing, Petitioner also admitted to several other aggravating factors - causing the victim serious physical harm, and continuing to strike the victim after he was unconscious resulting in facial fractures - which exposed Petitioner to the fully aggravated sentencing range. As set forth above, Petitioner’s aggravated sentence did not run afoul of Petitioner’s Sixth Amendment rights articulated in *Apprendi/Blakely*. Because no *Apprendi/Blakely* error occurred, neither trial counsel nor post-conviction counsel was ineffective for failing to challenge Petitioner’s sentence on those grounds. *See James v. Borg*, 24 F.3d 20, 27 (9<sup>th</sup> Cir. 1994) (finding that “[c]ounsel’s failure to make a futile motion does not constitute ineffective assistance of counsel.”); *United States v. Quintero-Barraza*, 78 F.3d 1344, 1349 (9<sup>th</sup> Cir. 1995) (finding that “[c]ounsel was under no obligation to bring a plainly unavailing motion before the district court.”). Accordingly, Petitioner cannot establish that the state court’s rejection of this

1 claim was contrary to, or rested on an unreasonable application of, *Strickland*, or was based on  
2 an unreasonable determination of the facts. 28 U.S.C. § 2254(d).

3 **IV. Conclusion**

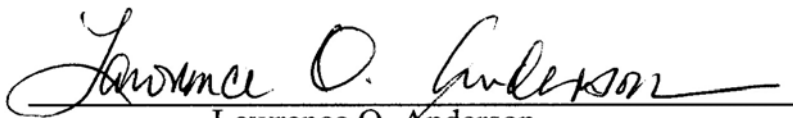
4 Based on the foregoing, the Petition for Writ of Habeas Corpus should be denied.

5 Accordingly,

6 **IT IS HEREBY RECOMMENDED** that Petitioner's Petition for Writ of Habeas  
7 Corpus (docket # 1) be **DENIED**.

8  
9 This recommendation is not an order that is immediately appealable to the Ninth  
10 Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of  
11 Appellate Procedure, should not be filed until entry of the District Court's judgment. The  
12 parties shall have ten days from the date of service of a copy of this recommendation within  
13 which to file specific written objections with the Court. *See*, 28 U.S.C. § 636(b)(1); Rules 72,  
14 6(a), 6(e), Federal Rules of Civil Procedure. Thereafter, the parties have ten days within which  
15 to file a response to the objections. Failure timely to file objections to the Magistrate Judge's  
16 Report and Recommendation may result in the acceptance of the Report and Recommendation  
17 by the District Court without further review. *See United States v. Reyna-Tapia*, 328 F.3d 1114,  
18 1121 (9th Cir. 2003). Failure timely to file objections to any factual determinations of the  
19 Magistrate Judge will be considered a waiver of a party's right to appellate review of the  
20 findings of fact in an order or judgment entered pursuant to the Magistrate Judge's  
21 recommendation. *See*, Rule 72, Federal Rules of Civil Procedure.

22 DATED this 5<sup>th</sup> day of October, 2009.

23  
24   
25 Lawrence O. Anderson  
26 United States Magistrate Judge  
27  
28